

SEP 5 4 25 PM '96



FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

September 5, 1996

AGENDA ITEM

For Meeting of: SEP 12 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Further Revised Draft Advisory Opinion 1996-25

Attached is another revised draft of the subject opinion for the Commission's consideration and approval on the September 12 agenda.

The changes in this draft are made pursuant to the requester's letter dated August 15, 1996, that responds to questions the Commission directed this office to ask at the August 1 meeting. At that meeting the Commission was considering Agenda Document #96-77.

The revised and new language (as compared to Agenda Document #96-77) are noted with **bolded text** on each page where such revisions are made.

Attachment

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DRAFT

1
2 **ADVISORY OPINION 1996-25**

3
4 **David Frulla**
5 **Brand, Lowell & Ryan P.C.**
6 **923 Fifteenth Street, N.W.**
7 **Washington, D.C. 20005**

8
9 **Dear Mr. Frulla:**

10
11 **This refers to your letters dated August 15, May 24 and May 10, 1996, which request**
12 **advice concerning application of the Federal Election Campaign Act of 1971, as amended ("the**
13 **Act"), and Commission regulations to the voluntary check-off program maintained by Seafarers**
14 **Political Activity Donation ("SPAD"). You ask about the application of the Commission's**
15 **recently amended "best efforts" regulation to SPAD's check-off program and SPAD's obligation**
16 **to identify the employers of SPAD's union member contributors.**

17 **FACTUAL BACKGROUND**

18 **SPAD is the separate segregated fund of the Seafarers International Union ("SIU") which**
19 **represents merchant seamen and boatmen ("seamen") aboard U.S.-flag vessels on the high seas,**
20 **the Gulf of Mexico, and inland lakes and waterways. Almost all of these seamen are employed**
21 **through what is known as "rotary" crewing. This consists of SIU regional hiring halls referring**
22 **union members for periodic employment with SIU-contracted companies.¹ Once referred, an**
23 **individual merchant seaman will generally work for a shipping company employer only for the**
24 **duration of a trip at sea. A trip lasts only a few months and, often times, they are even shorter.**
25 **You state that, after the trip concludes, the SIU member returns to the "beach" and places his or**

¹ You state that there are approximately one hundred companies that have contracted with SIU to obtain the referral of SIU members for employment.

1 her name on the hiring hall's list of individuals waiting to ship. The union member then returns
2 to work some time later, most often for a different employer, once he or she has reached the top
3 of the hiring list.

4 You point out that the periodic and ever-changing nature of maritime employment
5 precludes SPAD from using a conventional, labor organization separate segregated fund check-
6 off program. To deal with the circumstances of the rotary crewing, SPAD's check-off
7 contributions are remitted from a participating member's share of the SIU's employer-funded
8 vacation plan, and not from individual SIU-contracted employers.² SPAD solicits a member to
9 voluntarily check off a portion (usually fifty cents) of each day of employment for which he or
10 she applies for vacation pay. You explain that this approach surmounts the logistical barriers
11 preventing SPAD from maintaining a check-off arrangement with individual SIU- contracted
12 employers.³

13 In SPAD's request, you offer several different alternative proposals to satisfy
14 SPAD's obligation to make best efforts in obtaining contributor information. You state that
15 SPAD's solicitations ask each participating SIU member to provide his or her name or address.

² You state that pursuant to its collective bargaining agreement with SIU, an employer must make a payment to the SIU vacation plan on behalf of each SIU member that it has employed. An employers' vacation plan payment for an individual union member corresponds to the length of his or her employment with that company. Provided other eligibility criteria are met, an SIU member may request vacation pay at the conclusion of his or her trip at sea, whereupon the SIU vacation plan will issue the member one lump sum check comprising all the vacation pay to which the member is entitled. You explain that a member must accrue 120 days of employment before becoming eligible to receive payment and any additional payment must follow another 120 days of employment. The administration of the plan is kept technically separate from SIU. However, it is administered by a board of trustees comprised in equal part of management and union representatives.

³ The request includes a copy of the Seafarers vacation pay application form. The form contains a general authorization that is signed by a member to deduct the amounts which will be the contribution(s) to SPAD. You state in your request that the authorization is effective until it is revoked by the member. This could be done, however, when a member fills out a new application for vacation pay following another 120 day period of employment.

1 You add that contributors willingly provide this information and SIU's vacation plan has this
2 information on file. SPAD also obviously knows the occupations of its contributors who
3 participate in the SIU's vacation plan check-off. They are all merchant mariners. The above
4 information is therefore easily disclosed in SPAD's reports filed with the Commission.
5 However, due to the nature of the rotary crewing system described above, you state that SPAD
6 does not ask a participating SIU member to identify his or her employer on its check-off
7 authorization form. Currently, SPAD does not independently seek this information from a
8 member whose annual contributions exceeds \$200. You note that at the time a contribution is
9 obtained through the check-off program, the contributor is between assignments and is not
10 working for any employer. Because of the above circumstances, you ask that the Commission
11 conclude that SPAD's seeking the contributor's name, address and occupation but not seeking
12 the contributor's employer meets its "best efforts" requirement as set forth in Commission
13 regulations. In the event that SPAD must complete the employer box of its FECA disclosure
14 forms, you propose that SPAD be permitted to report that the contributor is employed by
15 "various U.S.-flag vessel operators."⁴ As another alternative, SPAD offers to include in the
16 Seafarers vacation pay application form a request for information regarding the current

⁴ In the most recent report filed with the Commission, for each contributor SPAD indicated that the name of the contributor's employers is "not available."

employment of the member wishing to contribute.⁵ You state that the results of this inquiry would then be reported in SPAD's FEC disclosure reports.

THE ACT AND COMMISSION REGULATIONS

When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by the Act for the political committee, any report or any records of such committee are considered in compliance with the Act. 2 U.S.C. §432(i) and 11 CFR 104.7(a). The identification of individual contributors required by the Act for individuals whose contribution(s) aggregate in excess of \$200 in a calendar year requires providing the individual's full name, mailing address, occupation and the name of the contributor's employer. 2 U.S.C. §431(13) and 11 CFR 100.12.

The treasurer will be deemed to have exercised best efforts to obtain the information for this identification if all written solicitations include a clear request for the contributor's full name, mailing address, occupation and the name of employer. 11 CFR 104.7(b)(1) and (2). The treasurer of a political committee must report all contributor information not provided by the contributor, but in the political committee's possession, regarding contributor identification. This includes information in a committee's contributor records, fundraising records and

⁵ The request would be worded as follows:

Are you currently sailing or assigned to a vessel on the date of this application? CHECK ONE:

_____ No, I am "on the beach."

_____ Yes, I am currently working for _____.

1 previously filed reports, in the same two-year election cycle in accordance with 11 CFR 104.3.
2 11 CFR 104.7(b)(3).

3 The Supreme Court has held that the disclosure of each large contributor's name and
4 address as well as the donor's occupation and principal place of business serves informational
5 functions, as well as the prevention of corruption and the enforcement of the contribution
6 limitations. *Buckley v. Valeo*, 424 U.S. 1 (1976). The Commission's "best efforts" regulation,
7 cited above, is designed to "promote the very gathering of information that *Buckley* found to be
8 in the public interest." *Republican National Committee v. Federal Election Commission*
9 (*"RNC"*), 76 F.3d 400, 408 (D.C. Cir. 1996), *petition for rehearing In Banc denied*, No. 94-5248
10 (D.C. Cir. June 11, 1996).⁶

11 **BEST EFFORTS AND SPAD**

12 The Commission notes that it has concluded that a vacation fund administered by a labor
13 organization is a permissible source of voluntary contributions to a separate segregated fund
14 using a deduction authorization plan. See Advisory Opinions 1980-74, 1980-69 and 1979-60.
15 However, your proposal to provide no information regarding your contributors' employers would
16 not meet the disclosure needs of the Act. Therefore, the Commission concludes that **declining to**
17 **disclose** any employer name for contributors whose contributions exceed \$200 in a calendar year

⁶ Congress noted the importance of a best efforts test: The 1979 report from the Committee on House Administration that accompanied the 1979 amendments to the Act noted that "[t]he best efforts test is crucial since contribution information is voluntarily supplied by persons who are not under the control of the committee." H.Rep. No. 96-422, 96th Cong., 1st Sess. 14 (1979).

1 would not fulfill SPAD's "best efforts" obligations as set out in 11 CFR 104.7(b)(1) and (2).⁷

2 **However, SPAD's proposals taken together would meet the requirements of the**
3 **regulations.**

4 **At the time a written solicitation is made, SPAD is required by 11 CFR 104.7(b)(1)**
5 **to request information from a contributor regarding the contributor's employment. The**
6 **sample inquiry you propose to place in the Seafarers vacation pay application form (see**
7 **footnote 5) would fulfill that obligation, insofar as the application is used as a means to**
8 **solicit contributions.⁸ If a contributor provides information that he or she is currently**
9 **employed, SPAD is required to include that information in its identification of the**
10 **contributors in its FEC reports. If a contributor states that he or she is unemployed,**
11 **SPAD's alternative to report that a contributor is employed by "various U.S.-flag vessel**
12 **operators," would be a sufficient identification of employment status. Again, as your**
13 **request indicates, because of the nature of the hiring hall system for making employment**
14 **assignments, to list the contributor as simply "unemployed" would be somewhat**
15 **inaccurate.**

16 **The Commission concludes that SPAD is required, as any other political committee, to**
17 **follow the other remaining procedures of 11 CFR 104.7(b)(1),(2) and (3). Should a contributor**

⁷ You state in your request that, technically, members of SIU are unemployed at the time they make their contributions. However, because of the industry's employment practices that you have explained, to disclose their employment status as "unemployed" would be somewhat inaccurate.

⁸ The facts of your opinion indicate that this application form is the primary method by which SPAD solicits contributions. However, amending the Seafarers vacation pay application form does not, of course, relieve SPAD of its obligations under section 104.7 to inquire regarding the employment of a contributor in any other written solicitation it adopts or uses.

1 fail to provide SPAD with its current or most recent employer (for example, fails to complete
2 the vacation pay application form with the requested information) after the initial inquiry
3 made under section 104.7(b)(1), SPAD must make a follow up inquiry under section
4 104.7(b)(2).⁹

5 The Commission recognizes that a connected organization--whether a corporation,
6 membership organization, trade association, labor organization, or cooperative-- establishes,
7 administers or financially supports its separate segregated fund.¹⁰ See 2 U.S.C. §§431(7),
8 441b(b)(2)(C) and 11 CFR 100.6. It is presumed that, as a result of this relationship, certain
9 types of separate segregated funds (such as SPAD) will have access to information about their
10 contributors (for example, union members) who stand in a special relationship to the connected
11 organization.¹¹ The Commission, therefore, concludes that its regulations at section 104.7(b)(3),
12 require SPAD to obtain employment information from its connected organization if the required
13 "best efforts" inquiries fail to produce that information from the SPAD donor.¹²

⁹ The other requirements, as set out in section 104.7(b)(2) and in accord with *RNC*, are that the inquiry may be either written or oral (documented by a committee writing), that the inquiry be made no later than thirty (30) days after the receipt of the contribution, that the request not include any other material or solicitation, but it may thank the contributor for the previous contribution(s). A written request should be accompanied by a pre-addressed return post card or envelope. 11 CFR 104.7(b)(2).

¹⁰ Commission regulations assume that a labor organization has control of its separate segregated fund. 11 CFR 114.5(d) and Advisory Opinion 1996-1. See *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 426 (1972). (The Court concluded "it is difficult to conceive how a valid political fund can be meaningfully 'separate' from the sponsoring union in any way other than 'segregated.'").

¹¹ The Commission acknowledges, however, that other types of separate segregated funds, such as those sponsored by membership organizations, trade associations and cooperatives, may not have the same access to contributor information as labor organizations and corporations with capital stock. Instead, their situation is more similar to that of party committees, authorized committees and nonconnected committees with regard to the contributor information they have available.

¹² The regulation places importance upon a committee's obligation to provide information on contributors from internal sources when information from the contributor is not forthcoming. The Commission notes your statement that the SIU vacation plan already has the name and address of union member. You state that, regarding employment information, "[n]owhere ...does the record reveal that the SIU maintains this type of information in any

